Filed 11/18/03 P. v. Saal CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>LIBBY SAAL,<br>Defendant and Appellant. | C043408<br>(Super. Ct. No. CM017841) |

Defendant Libby Saal pled no contest to a felony charge of making criminal threats and was placed on probation for three years.

On appeal, defendant contends the trial court abused its discretion by denying her motion to reduce the offense to a misdemeanor at the preliminary hearing and by failing to reduce the offense on its own motion at sentencing. Defendant further argues that defense counsel was ineffective in failing to renew the motion at sentencing, and the probation condition that she not have contact with minors under the age of 18, except in the

presence of a responsible adult approved in advance by the probation officer, is unconstitutionally overbroad.

We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On September 1, 2002, a Butte County Sheriff's Deputy was dispatched to a residence on a report of threats made to children. A 12-year-old girl reported that she had been outside playing with other children when defendant yelled out her window, "'I'm going to get my gun and shoot all of you little fucking bastards.'" The girl said she was frightened and ran to her grandmother's residence. The girl also stated that in the past defendant had told her and other children to stay away from her residence because she was a "'child molester'" and if they did not stay away, she would "'rape'" them.

The deputy then contacted defendant at her residence and noted she was hostile and irate. Defendant began yelling, "'You believe those little fucking bastards'" and "'I hate kids. . . . I have to listen to them play outside my window all day, the little fucking bastards. I hate kids.'" Then defendant appeared to calm down, told the deputy she was done talking to him, and attempted to shut the door; a struggle ensued and defendant was arrested.

Defendant was charged with one felony count of making criminal threats (Pen. Code, § 422).[1] She agreed to submit the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

preliminary hearing on the police reports. At that hearing, defense counsel made a motion to reduce the offense to a misdemeanor pursuant to section 17, subdivision (b) (hereafter section 17(b)). The prosecutor opposed the motion. After oral argument, the court denied the motion without prejudice. At the next court hearing, defendant entered a no contest plea to the charged offense as a felony. The court suspended imposition of sentence and placed defendant on formal probation for three years with various probation conditions. During the sentencing hearing, defense counsel did not ask the court to reduce the offense to a misdemeanor, and the court did not address the issue.

Defendant filed this appeal with a certificate of probable cause from the trial court.

DISCUSSION

I

*Reduction of a Felony to a Misdemeanor*

Criminal threats is a "wobbler," that is, it can be a felony or a misdemeanor (§ 422). Section 17(b) expressly gives the trial court the power to reduce a "wobbler" filed as a felony to a misdemeanor. This can be on the motion of defense counsel or on the court's own motion. (*People v. Manning* (1982) 133 Cal.App.3d 159; *People v. Municipal Court (Kong)* (1981) 122 Cal.App.3d 176.)

Defendant argues that the court abused its discretion by denying her motion to reduce the offense to a misdemeanor at the preliminary hearing and by failing to do so on its own motion at

sentencing. Defendant's claim of error regarding the trial court's denial of the section 17(b) motion before her no contest plea is not reviewable on appeal because it was waived by the plea. Further, under the circumstances in this case, we conclude the trial court's failure to reduce the offense on its own motion at sentencing was not an abuse of discretion.

A

*Denial of the Section 17(b) Motion*

Defendant pled no contest to the charge of making criminal threats *as a felony.* Following such a plea, the issues cognizable on appeal are limited to those "based on 'reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings' resulting in the plea." (*People v. DeVaughn* (1977) 18 Cal.3d 889, 895-896.) "Other than search and seizure issues . . . all errors arising prior to entry of a guilty plea are waived, except those which question the jurisdiction or legality of the proceedings resulting in the plea." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 9.)

Here, defendant's challenge to the denial of her section 17(b) motion is based on the events that occurred before her no contest plea. The alleged abuse of discretion does not implicate the jurisdiction or legality of the proceedings resulting in the plea. Further, the issuance of a certificate of probable cause does not expand the grounds for appeal. (*People v. Geitner* (1982) 139 Cal.App.3d 252, 254.) Therefore, the alleged error in denying the section 17(b) motion was waived by the plea and cannot be raised on appeal.

This case is distinguishable from *People v. Padfield* (1982) 136 Cal.App.3d 218 (*Padfield*), where the court held a no contest plea did not waive the defendant's right to challenge on appeal the trial court's pretrial denial of diversion. In *Padfield*, the court reasoned that while a guilty plea admits all matters essential to the conviction, "a conviction is not a predicate to diversion eligibility. . . . [¶] Pretrial diversion instead 'refers to the procedure of postponing prosecution either temporarily or permanently' . . . . A diverted defendant who successfully performs is entitled to have the criminal prosecution dismissed. . . . [¶] Since a factually guilty but otherwise eligible defendant is entitled to be diverted, his plea of guilty cannot be deemed a waiver of his asserted but denied right to diversion. We hold therefore that the wrongful denial of pretrial diversion constitutes 'other grounds going to the legality of the proceedings' [citation], and may be raised on appeal . . . ." (*Id.* at p. 228, fn. omitted.)

Here, unlike a claim of wrongful denial of diversion, defendant's claim that the felony charge against her should have been reduced to a misdemeanor does not go to the jurisdiction or legality of the proceedings. Thus, the reasoning in *Padfield* does not apply here. We conclude the alleged abuse of discretion in refusing to reduce the offense to a misdemeanor at the preliminary hearing is not reviewable on appeal.

B

*The Trial Court's Failure to Reduce the Offense Sua Sponte*

Defendant further argues that the trial court abused its discretion by failing to reduce the offense to a misdemeanor on its own motion at sentencing. A trial court retains the power to reduce a "wobbler" from a felony to a misdemeanor at sentencing. (§ 17(b)(3).) A trial court's decision in exercising such power is subject to review under the deferential abuse of discretion standard. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 356, pp. 404-405; see also *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

"[A]n appellant who seeks reversal [for abuse of discretion] must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree . . . ." (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.) An abuse of discretion occurs only when the court exceeds the bounds of reason in light of all of the surrounding circumstances. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Here, we find no abuse of discretion. Defendant explicitly pled no contest to a *felony* charge and indicated she understood the consequences attached to a *felony* plea. The court's reduction of the offense to a misdemeanor after defendant pled guilty to a felony would have contravened the terms of the plea and deprived the People of the benefits of the plea agreement. Under these circumstances, the court did not act irrationally or arbitrarily in refusing to reduce the offense on its own motion at sentencing.

II

*Ineffective Assistance of Counsel*

Defendant also argues she was denied her right to effective assistance of counsel because her trial counsel failed to renew the section 17(b) motion at the sentencing hearing. Defendant's claim of ineffective assistance of counsel fails, however, for the same reason her previous argument failed, because defense counsel could not have renewed the motion without contravening the terms of the plea and denying the People the benefit of their bargain.

A defendant is estopped from accepting a plea and then attempting to get a better deal at the time of sentencing. (*People v. Ellis* (1987) 195 Cal.App.3d 334, 347.) If defense counsel had asked the trial court to reduce the offense to a misdemeanor after defendant had pled guilty to a felony, counsel would have been asking the court to contravene the terms of the plea and deprive the People of the benefits of the plea agreement. An attorney does not act unreasonably by refusing to ask a court to violate a plea agreement. Accordingly, defendant's ineffective assistance of counsel claim fails.

III

*Overbroad Probation Condition*

The trial court granted defendant probation with various conditions imposed. Defendant expressly agreed to all conditions as imposed at the sentencing hearing. On appeal, defendant contends one of the conditions, which requires defendant to have no contact with any minor under the age of 18, except in the

presence of a responsible adult approved in advance by the probation officer, is unconstitutionally overbroad. We decline to review the claim because it has been waived.

Defendant recognizes her failure to object but suggests that we should follow *In re Justin S.* (2001) 93 Cal.App.4th 811 (*Justin S.*), where the court found an exception to the waiver rule when the challenge on appeal raised a pure question of law. In light of the abundance of authority holding to the contrary, we are unconvinced by and decline to follow *Justin S.*

"The California Supreme Court has repeatedly held that constitutional objections must be interposed in order to preserve such contentions on appeal." (*In re Josue S.* (1999) 72 Cal.App.4th 168, 170.) In *People v. Gardineer* (2000) 79 Cal.App.4th 148, the defendant argued on appeal that the probation condition to "observe good conduct" was unconstitutionally vague, but he never objected to it in the trial court. The court held "[a] defendant who contends a condition of probation is constitutionally flawed still has an obligation to object to the condition on that basis in the trial court in order to preserve the claim on appeal." (*Id.* at p. 151)

The reason for the waiver rule was clearly articulated in *People v. Welch* (1993) 5 Cal.4th 228, 235: "A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. . . . A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of

invalid probation conditions and reduce the number of costly appeals brought on that basis. [Citations.]"

We find the reasoning and citation of authority in *Josue S. and Gardineer* persuasive, and we choose to follow them here. Therefore, we conclude that defendant's challenge has been waived by her failure to object when it was imposed.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P.J.

HULL, J.